No. 953

In the Supreme Court of the United States

OCTOBER TERM, 1926

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

v.

D. J. ALFORD

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA

BRIEF FOR THE DEFENDANT IN ERROR

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CITATIONS

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 3) is unreported.

GROUNDS OF JURISDICTION

The judgment of the District Court was entered March 3, 1927 (R. 3–4), sustaining a demurrer to the second count of the indictment, set forth at R. 2. Petition for a writ of error was filed and allowed the same day. (R. 5.) The District Court based its decision on a construction of Section 53 of the Penal Code, on which the indictment was founded, holding that the statute was not intended

to make it an offense to build and leave a fire on land outside the public domain but near forest on the domain, which was all count two charged. Jurisdiction is invoked under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, granting a writ of error to the United States " from a decision or judgment * * * sustaining a demurrer, to any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded."

QUESTION PRESENTED

The questions in this case are whether Section 53 of the Penal Code, making it an offense to build and leave a fire near timber or other inflammable material upon the public domain, covers the case where the fire is built off the public domain but near inflammable material on it, and whether the statute so construed is within the power of Congress.

STATUTE INVOLVED

Section 53 of the Penal Code of March 4, 1909 (c. 321, 35 Stat. 1088, 1098), as amended by the Act of June 25, 1910 (c. 431, 36 Stat. 855, 857), reads as follows:

> Whoever shall build a fire in or near any forest, timber, or other inflammable material upon the public domain, or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under the authority of the United States, or upon

> any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall, before leaving said fire, totally extinguish the same; and whoever shall fail to do so shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both.

STATEMENT OF THE CASE

Defendant was indicted in the United States District Court for the Northern District of Florida on May 12, 1925. (R. 2.) The indictment was in two counts. The second, which is the one here involved, being based upon Section 53 of said Penal Code (35 Stat. 1098, as amended), charged that defendant "did unlawfully build a fire near inflammable grass and other inflammable material and timber situated upon the public domain and lands of the United States * * * and before leaving said fire so built by him did not totally extinguish the same, whereby * * * the inflammable * * * material on the said lands comprising a part of the public domain was burned." (R. 2.) To the second count a demurrer was filed (R. 3), based chiefly upon the grounds that the count does not state an offense against the laws of the United States because the statute does not cover the building or leaving of fires at any place "except upon a *forest reserva-*

tion"; and that if said statute attempts "to cover fires upon any place other than a *forest reservation*" it is unconstitutional and void. (R. 3.) Obviously defendant, in using the words "forest reservation," had reference to and intended to use the words "public domain," and the demurrer was so treated by the court below. The second count charges no more than that the fire in question had been built by defendant on lands "other than the public domain itself, but near by." (R. 4.) The lower court construed the statutory prohibition to be limited to fires, left without first totally extinguishing the same, which had been built "upon the public domain itself near inflammable material on the public domain and not upon lands near by that may be privately owned," and ordered entry of judgment sustaining the demurrer. (R. 3–5.)

SPECIFICATION OF ASSIGNED ERROR TO BE URGED

The court erred in its construction of the statute (Sec. 53, Penal Code) in sustaining the demurrer to the second count of the indictment (R. 5) on the ground that the statute does not cover the case of a fire started off the public domain.

SUMMARY OF ARGUMENT

1. The statutory language is reasonably plain.

2. Where the words of a statute are susceptible to two constructions, the broader of which will carry out fully the evident legislative purpose,

and the narrower will so unduly restrict its operation as to render it largely ineffective to accomplish that purpose, the construction should be adopted which will give full effect to the known intent of Congress in its enactment.

The known purpose of Congress in enacting this statute was to protect the Government-owned timber from fire, and should be made effective. Fires started off the public domain but near timber which is on it, are as dangerous as fires on the public domain and near timber on it.

3. The application to the words of this statute of that construction which will effectuate the known legislative intent is not violative of the rule that criminal and penal statutes will be strictly construed.

4. It is clearly within the constitutional power of Congress to prohibit one from leaving unextinguished a fire built by him on private land, but near timber or other inflammable material upon the public domain.

ARGUMENT

I

THE STATUTORY LANGUAGE IS REASONABLY PLAIN

Scrutiny of the language of Section 53 itself discloses no ambiguity. It prohibits one from leaving unextinguished a fire built by him under certain specified conditions, viz: If such fire is built "in or near any forest, timber, or other inflammable

material," where such forest, timber, etc., is upon the public domain. This is the fair and reasonable meaning of the language used, and gives full and complete effect to each and every word used, in the order in which it is used, without addition thereto or deduction therefrom. In order to narrow its scope within the limits fixed by the court below, it is necessary either to add to the statutory language (as did the lower court, R. 4), after the words in the first line, "Whoever shall build a fire," the additional words, "upon the public domain," or words of similar import, or so to transpose the statutory language as to accomplish the same result, or to treat the words "upon the public domain" as relating to the place of the fire rather than to the location of the forest or timber near which the fire is located.

The language used by this Court in *United States* v. *Hartwell,* 6 Wall. 385, at page 395, is quite apt here:

> The object in construing penal, as well as other statutes, is to ascertain the legislative intent. That constitutes the law. If the language be clear it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that inten tion must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and overstrict

> construction. The rule (that penal statutes are strictly construed) does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity, which the legislature ought not to be presumed to have intended.

The attempt at judicial construction by the lower court of the plain and unambiguous terms of this statute, by interpolating additional language in order to limit it to its idea of what Congress probably intended, merely creates doubt and confuses the judgment, and serves "to obscure far more than to elucidate the meaning of the law." (*Webber* v. *St. Paul City Ry. Co.*, 97 Fed. 140, 144.)

The indictment is in terms almost identical with the statute, and though the District Court treated the indictment as describing a case of fire built off but near the public domain, it held that the statute did not include such a case.

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II

WHERE THE WORDS OF A STATUTE ARE SUSCEPTIBLE TO TWO CONSTRUCTIONS, THE BROADER OF WHICH WILL CARRY OUT FULLY THE EVIDENT LEGISLATIVE PURPOSE, AND THE NARROWER WILL SO UNDULY RESTRICT ITS OPERATION AS TO RENDER IT LARGELY INEFFECTIVE TO ACCOMPLISH THAT PURPOSE, THE CONSTRUCTION SHOULD BE ADOPTED WHICH WILL GIVE FULL EFFECT TO THE KNOWN INTENT OF CONGRESS IN ITS ENACTMENT

The known purpose of Congress in enacting this statute was to protect the Government-owned timber from fire and should be made effective.

It should be borne clearly in mind that the purpose of Congress in enacting Sections 52 and 53 (originally enacted as Sections 1 and 2 of the Act of February 24, 1897, c. 313, 29 Stat. 594), was not to regulate and control the occupancy and use by individuals of the public domain, but to protect the huge timber stand thereon from the ever present menace of forest fires. This purpose is manifest whether the statutory language alone be scrutinized or recourse be had to its legislative history. It is specifically declared in the title of the Act of 1897 as "An Act To prevent forest fires on the public domain." While, of course, not a part of the statute itself, the title of an Act has been said by this Court to be the best brief summary of its purpose (*Millard* v. *Roberts,* 202 U. S. 429, 437),

and entitled to consideration (*United States* v. *Fisher,* 2 Cranch, 358, 386; *Petri* v. *Creelman Lbr. Co.,* 199 U. S. 487, 495; *Holy Trinity Church* v. *United States,* 143 U. S. 457, 462; *Price* v. *Forrest,* 173 U. S. 410, 427).

The Court will take judicial notice of the facts that, at the time the original statute was passed, the forests on the public domain were (and, indeed, still are) continually subject to injury and destruction by forest fires, that the timber was being rapidly depleted, and that many of such fires were due to wilfulness or to ignorance and carelessness of individuals in the use of fire.

(The legislative history of the statute and the pertinent portions of the committee reports and debates thereon are collected in Appendix A, attached to this brief.)

This evident legislative purpose can be subserved only if the statute be construed as prohibiting the leaving unextinguished of all fires which, by reason of being built in or near the timber on the public domain, constitute a menace thereto. Other conditions being equal, a fire is no less a menace to the Government timber by reason of its being built (as is here the case) in inflammable material on private land adjacent to the Government-owned forest than if it be built on the public domain itself. Forest fires know nothing of public-land surveys and pay no attention to artificial boundaries. It is evident that the statute is not intended to prohibit the leav-

ing unextinguished of all fires on the public domain. A fire built in the midst of the desert, for example, far from any inflammable material, would not fall within its terms. It is submitted that it is equally evident that the statutory prohibition is directed, not merely against leaving unextinguished those fires built *on the public domain* which menace the Government-owned timber, but against all fires built "in or near" inflammable material which menace such forest. To limit it, as did the trial court, to fires started on the public domain only, is so to limit its operation as to leave open, without statutory penalty, all of the Government's vast timber holdings throughout the country to the mercy of the careless and negligent auto tourist, camper, homesteader, and the like who may start a fire adjacent to but just off the public domain. Such a result should be avoided, if possible. *United States* v. *Hartwell*, 6 Wall. 385, 395; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59.)

So to construe the statute as to apply its prohibition to all fires built "in or near" the public timber, regardless of whether built on the public domain itself or on adjacent privately owned land, is to give it a construction not requiring the addition thereto or the taking therefrom of a word or a syllable; not requiring the transposition or paraphrasing of any of its language; not requiring the alteration even of a comma or a period; to give full effect to each and every word appearing in the

section, to its arrangement, grammatical construction, and punctuation, and to give full effect to the known legislative purpose in its enactment. And this view is strongly fortified when it is considered that this is the construction given it both by the Federal District Courts and the Department of Justice, uniformly and continuously, from the time of its original enactment to the present date. While a complete list of such cases is not available, there are collected and set forth in Appendix B hereto a number of criminal prosecutions under this section and Section 52, covering the period from 1910 to 1921, inclusive, which are based on fires set on private lands adjacent to the public domain, and which have arisen in connection with the administration of the National Forests. As said by this Court in *Ash Sheep Company* v. *United States*, 252 U. S. 159, 169, a suit to recover a statutory penalty for the grazing of sheep on the Crow Indian Reservation under a statute prohibiting the grazing of cattle on Indian lands and providing a civil penalty for its violation (p. 169):

> * * * since the pasturing of sheep is plainly within the mischief at which this section aimed; since the word "cattle," which is used, may be given, say all the authorities, a meaning comprehensive enough to include them; and since the courts and the Department of Justice for almost fifty years have interpreted the section as applicable to "sheep," we accept this as the

intended meaning of the section, for had it been otherwise Congress, we must assume, would long since have corrected it.

III

THE APPLICATION TO THE WORDS OF THIS STATUTE OF THAT CONSTRUCTION WHICH WILL EFFECUATE THE KNOWN LEGISLATIVE INTENT IS NOT VIOLATIVE OF THE RULE THAT CRIMINAL AND PENAL STATUTES WILL BE STRICTLY CONSTRUED

When a court resorts to rules of statutory construction, it does so in an effort to seek light on the intent of the legislature, as expressed in the statutory language. It does not attempt to use the rule as a Procrustean bed, to which the statute must be fitted, regardless of its applicability. What the legislative body sought to accomplish in enacting the statute is the touchstone sought, and if the statutory language used is reasonably suceptible, in itself, to a construction which will give effect to such intent, when known, that construction must be adopted. (*Ash Sheep Company* v. *United States,* 252 U. S. 159; *United States* v. *Bowman,* 260 U. S. 94.) The well-settled rule that penal and criminal statutes are to be construed strictly does not mean that the narrowest possible construction of which the language is susceptible must be adopted, so as to defeat the obvious intent of Congress, as expressed in the language actually used according to its reasonable meaning (*Johnson* v. *Southern Pacific Co.,* 196 U. S. 1, 14–19), but merely that the language used is not to be extended, by construction,

to cover cases not clearly within its ordinary reasonable meaning, or to those exceptional to its spirit and purpose (*United States* v. *Chemical Foundation,* 272 U. S. 1, 18). Can it reasonably be said that this is such a case?

The rule that penal statutes are to be strictly construed was laid down by Chief Justice Marshall as early as 1820 in *United States* v. *Wiltberger,* 5 Wheat. 76. But in his opinion we find (p. 95):

> It is said, that notwithstanding this rule, the intention of the law-maker must govern in the construction of penal, as well as other statutes. This is true. But this is not a new independent rule, which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases, which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend.

This exception, namely, that the obvious intention of the legislature is not to be defeated, is well established.

> *United States* v. *Wiltberger,* 5 Wheat. 76, 95–96.
>
> *United States* v. *Hartwell,* 6 Wall. 385, 396.

United States v. *Lacher,* 134 U. S. 624, 629.

United States v. *Corbett,* 215 U. S. 233, 242–243.

As said in *United States* v. *Hartwell, supra,* at page 396:

> The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent.

In *United States* v. *Lacher, supra,* at page 629, this Court quoted from *Sedgwick* on *Statutory and Constitutional Law* (2d Ed., page 282):

> The rule that statutes of this class are to be construed strictly, is far from being a rigid or unbending one; or rather, it has in modern times been so modified and explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment; the courts refusing, on the one hand, to extend the punishment to cases which are not clearly embraced in them, and, on the other, equally refusing by any mere verbal nicety, forced construction or equitable interpretation, to exonerate parties plainly within their scope.

United States v. *Lacher* has been repeatedly quoted and followed in the later decisions of the court.

Two recent decisions which are helpful are *United States* v. *Bowman*, 260 U. S. 94, and *Ash Sheep Co.* v. *United States*, 252 U. S. 159. In the former an indictment was returned, under Section 35 of the Criminal Code, for conspiracy to defraud the Emergency Fleet Corporation in which the United States was sole stockholder and the venue was laid on the high seas. A demurrer to the indictment was sustained by the lower court on the ground that jurisdiction must be conferred upon Federal courts specifically, and Section 35 contains no reference to the high seas as a part of the locus of offenses defined by it, as do the sections in Chapters 11 and 12 of the same Code. After referring to the amendment in 1918 (c. 194, 40 Stat. 1015) extending the provisions of Section 35 to corporations in which the United States is a stockholder, this Court said (page 102):

> We can not suppose that when Congress enacted the statute or amended it, it did not have in mind that a wide field for such frauds upon the Government was in private and public vessels of the United States on the high seas and in foreign ports and beyond the land jurisdiction of the United States, and therefore intend to include them in the section.
>
> Nor can the much quoted rule that criminal statutes are to be strictly construed avail. As said in *United States* v. *Lacher*, 134 U. S. 624, 629, quoting with approval from Sedgwick, Statutory and Constitutional Law, 2d

> ed., 282: "penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment." They are not to be strained either way. It needs no forced construction to interpret section 35 as we have done.

In *Ash Sheep Co.* v. *United States, supra,* the statute prohibited the grazing of cattle on Indian lands and provided a civil penalty for its violation. The appellant was sued for the penalty for grazing sheep on the Crow Indian Reservation. It was contended that the language of the statute referring to cattle could not be extended by implication to include sheep, in view of the rule that a penal statute must be strictly construed, but the Court said (p. 170):

> It is argued that the rule that penal statutes must be strictly construed forbids such latitude of construction. But this is sufficiently and satisfactorily answered by repeated decisions of this court.
>
> "The admitted rule that penal statutes are to be strictly construed, is not violated by allowing their words to have full meaning, or even the more extended of two meanings, where such construction best harmonizes with the context, and most fully promotes the policy and objects of the legislature." *United States* v. *Hartwell,* 6 Wall. 385; *United States* v. *Freeman,* 3 How. 556, 565; *United States* v. *Lacher,* 134 U. S. 624, 628.

It would seem beyond dispute that Sections 52 and 53 should be governed by like considerations. Had Congress intended to limit the operation of the statute, as contended by defendant, it would have been quite easy for it to have used appropriate restrictive language, either at the time of its original enactment in 1897, or its amendment in 1900, or its inclusion in the Federal Penal Code, or its amendment in 1910.

IV

IT IS CLEARLY WITHIN THE CONSTITUTIONAL POWER OF CONGRESS TO PROHIBIT ONE FROM LEAVING UNEXTINGUISHED A FIRE BUILT BY HIM ON PRIVATE LAND, BUT NEAR TIMBER OR OTHER INFLAMMABLE MATERIAL UPON THE PUBLIC DOMAIN

The constitutional authority for Congress, by appropriate legislation, to protect the timber on the public domain is found in Article IV, Section 3, Clause 2 of the Constitution, providing that—

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

Necessarily, this language must include power to legislate for the protection from destruction or damage of property belonging to the United States, such power being like in its nature to the police power of the States.

It is settled law that Congress has constitutional authority to exercise a power, as incident to any

of the delegated powers, analogous to the police power of the State. (*Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156.) In *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 215, the Court laid down this rule, quoting with approval from *Cooley's Constitutional Limitations*, page 732, that—

> Congress may establish police regulations as well as the States, confining their operation to the subjects over which it has been given control by the Constitution * * *.

The rule has been applied uniformly by this Court in a consistent line of cases, many of which are reviewed in *Brooks* v. *United States*, 267 U. S. 432. The Court there held that an Act prohibiting the transportation in interstate or foreign commerce of motor vehicles, with knowledge that they had been stolen, was merely an exercise by Congress of "the police power, for the benefit of the public, within the field of interstate commerce" (p. 436).

But, it may be contended, if Section 53 be so construed as to cover acts committed on private lands, it transcends the power of Congress, even its police powers, and encroaches on the police power of the States. The obvious answer is that, within the scope of its delegated powers, the authority of the United States is supreme, and where, as here, the Congress is enacting legislation respecting the property belonging to the United States under the above-quoted constitutional provision, it would

seem axiomatic that its authority so to protect its public lands extends over every person and every foot of land for such purposes. This is tersely stated in *Ex parte Siebold,* 100 U. S. 371, 395:

> We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.
>
> This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places.

Pensacola Telegraph Co. v. *Western Union Tel. Co.,* 96 U. S. 1, 10; *In re Neagle,* 135 U. S. 1, 60; and *United States* v. *Ferger,* 250 U. S. 199, 203, are also in point.

The national government has a direct interest in preventing fire in the timber on the public lands of the United States, and Congress may enact legislation for the protection of such direct interest applicable to acts as to which the State would have concurrent jurisdiction under its police power.

While most instances of police legislation by Congress have been enacted as an incident to the commerce clause, yet it is clear that Congress may exercise such powers as incident to any other of

the granted powers. This Court has held in *Camfield* v. *United States,* 167 U. S. 518, that Congress may, under this constitutional provision, make acts done upon privately-owned lands offenses against the United States. In that case, considering the act of a rancher in erecting fences on his privately owned alternate odd-numbered sections, checkerboarded through the public domain, so as effectively to bar access to the public lands, it was said (p. 525):

> Considering the obvious purposes of this structure, and the necessities of preventing the enclosure of public lands, we think the fence is clearly a nuisance, and that it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve an entry upon the lands of a private individual. The general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. If it be found to be necessary for the protection of the public, or of intending settlers, to forbid all enclosures of public lands, the Government may do so, though the alternate sections of private lands are thereby rendered less available for pasturage.

McKelvey v. *United States,* 260 U. S. 353, and *Perley* v. *North Carolina,* 249 U. S. 510, are also in point.

If Congress may, by the Fence Law (Act of February 25, 1885, c. 149, 23 Stat. 321), constitu-

tionally prohibit the erection of fences upon private land where the effect is substantially to enclose areas of public land, and make violation of such provisions a criminal offense, no reason is seen why it may not likewise prohibit the setting and leaving of fires on private land, where such fires are set or left so near timber and other inflammable material upon the public domain as to constitute a menace thereto, and enforce the same by criminal proceedings, without such statute being in conflict with the Constitution.

The right to enact this statute does not rest on exclusive territorial jurisdiction but on the power to protect the public domain. *United States* v. *Ramsey*, 271 U. S. 467.

CONCLUSION

It is submitted that the statute is unambiguous and should be given the plain and reasonable meaning of the language used, or, if it be held that ambiguity exists, the statutory language should be given that construction which will carry into effect the known purpose of Congress in its enactment. The judgment below should be reversed.

Respectfully submitted.

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APRIL, 1927.

APPENDIX A

LEGISLATIVE HISTORY OF SECTION 53 OF THE PENAL CODE, TOGETHER WITH PERTINENT EXTRACTS FROM COMMITTEE REPORTS AND DEBATES THEREON, AND ON LIKE PENDING LEGISLATION AT THE TIME OF ITS ENACTMENT

Section 53 of the Penal Code, as it now appears, was originally enacted as Section 2 of the Act of February 24, 1897, c. 313, 29 Stat. 594. That section, and Section 1 thereof (corresponding to Section 52), read as follows:

Act of February 24, 1897, c. 313, 29 Stat. 594:

> SEC. 1. That any person who shall willfully or maliciously set on fire, or cause to be set on fire, any timber, underbrush, or grass upon the public domain, or shall carelessly or negligently leave or suffer fire to burn unattended near any timber or other inflammable material, shall be deemed guilty of a misdemeanor, and upon conviction thereof in any district court of the United States having jurisdiction of the same shall be fined in a sum not more than five thousand dollars or be imprisoned for a term of not more than two years, or both.
>
> SEC. 2. That any person who shall build a camp fire, or other fire, in or near any forest, timber, or other inflammable material upon the public domain, shall, before breaking camp or leaving said fire, totally extinguish the same. Any person failing to do so shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any district court of the United States having jurisdiction of the same, shall be fined in a sum not more

than one thousand dollars, or be imprisoned for a term of not more than one year, or both.

SEC. 3. (Omitted — Immaterial to this question.)

By the Act of May 5, 1900, c. 349, 31 Stat. 169, it was amended by omitting the words "carelessly or negligently" in Section 1, and the words "camp fire or other" and the words "breaking camp or" in Section 2.

They were brought forward into the Penal Code (Act of March 4, 1909, c. 321, 35 Stat. 1088, 1098) as Sections 52 and 53, reading as follows:

SEC. 52. Whoever shall willfully set on fire, or cause to be set on fire, any timber, underbrush, or grass upon the public domain, or shall leave or suffer fire to burn unattended near any timber or other inflammable material, shall be fined not more than five thousand dollars, or imprisoned not more than two years, or both.

SEC. 53. Whoever shall build a fire in or near any forest, timber, or other inflammable material upon the public domain shall, before leaving said fire, totally extinguish the same; and whoever shall fail to do so shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both.

Section 53 was again amended by the Act of June 25, 1910, c. 431, 36 Stat. 855, 857, by inserting after the words "upon the public domain," the following additional language:

or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under the authority of the United States, or upon any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall

> remain inalienable by the allottee without the consent of the United States,

This is the present language of the statute.

The Act of February 24, 1897, *supra,* was introduced by Representative Shafroth, of Colorado, as H. R. 9123, 54th Congress, 1st Session, entitled "A bill to prevent forest fires on the public domain." At the same time Mr. Shafroth introduced another bill having a somewhat similar purpose, H. R. 9124, entitled "A bill to protect the forests on the public domain from destruction by fire."

The House Committee on Public Lands reported favorably on both bills (House Reports, 54th Congress, 1st Session, 1975 and 1976). These reports are as follows:

Report—To accompany H. R. 9123:

> The Committee on the Public Lands, to whom was referred the bill (H. R. 9123) entitled "A bill to prevent forest fires on the public domain," having had the same under consideration, do respectfully refer to report made on H. R. 9124, and further report:
>
> In the judgment of the committee a strict enforcement of the penal statutes contained in said bill by the United States courts will annually save millions of feet of lumber and to a great extent preserve the forests upon the public domain.

Report—To accompany H. R. 9124 (a companion bill which failed to pass):

> The Committee on the Public Lands, to whom was referred the bill (H. R. 9124) entitled "A bill to protect the forests on the public domain from destruction by fire," having had the same under consideration, respectfully report:

The greatest danger to the forests situate on the public domain of this country is destruction by fire. One fire often extends over 100 square miles, and thus the growth of centuries in trees on large tracts is often destroyed in a few days. It is almost impossible, in sparsely settled districts, for the inhabitants to extinguish these fires. They are generally stopped only by a change of wind to the opposite direction or by burning to some barren lands. The cutting of timber is almost infinitesimal compared to the destruction of the same by fire. *These fires are usually the result of carelessness upon the part of campers or hunters in failing to totally extinguish their camp fires before leaving the same.* (Italics ours.)

The object of this bill is to interpose a barrier to the spreading of such fires by cleared ways through such forests about 1,000 feet wide at intervals of 5 or 10 miles apart.

These cleared ways will no doubt answer the purpose of checking fires, except when the wind is very strong. Many of these ways will be cleared without expense to the Government, as the timber thereon is worth more than the cost of clearing. The bill provides that bids for the timber contained in said ways shall be let to the highest bidder upon condition that he clear the entire way, and it is provided that he give bond for the performance of his contract. It is left discretionary with the Secretary of the Interior how many of such ways will be cleared.

Your committee believe that the measure contained in said bill will, to a great extent, prevent the spreading of forest fires and the destruction of timber, and therefore recommend the passage of the bill.

The debates in the House on this legislation emphasize the need for it but throw little light on the question here presented.

H. R. 9123—Cong. Rec., Vol. 28, Part 7, 54th Cong., 1st Sess., pp. 6395–6396:

FOREST FIRES ON THE PUBLIC DOMAIN

Mr. SHAFROTH. Mr. Speaker, I move to suspend the rules and pass the bill H. R. 9123.

The Clerk read as follows:

A bill (H. R. 9123) to prevent forest fires on the public domain. * * *

The SPEAKER. The question is on suspending the rules and passing the bill.

Mr. BAILEY. I should like to ask the gentleman from what committee this proposition comes?

Mr. SHAFROTH. I will state to the gentleman that this comes from the Committee on Public Lands; and I will make a little statement concerning the necessity of this legislation. At the present time there is no law on the statute books punishing persons for setting fire to forests. Great destruction to the timber on the public domain is caused by forest fires. There has been considerable legislation on cutting timber; but the amount of timber that is cut compared with the destruction by fire is almost infinitesimal. The cutting is simply done near lines of railroads, which upon the map would be indicated simply by a line; but a forest fire will begin and it will sometimes in three days cover 100 square miles, thus destroying a growth of years.

Now, the necessity for legislation like this is apparent to everyone. We in the West for years have seen the necessity of preserving the timber on the public domain.

We are interested in preserving the shade, so that the snows on the mountains will not melt until the summer, and when they do melt will furnish a copious supply of water for irrigation purposes in the plains below. There is nothing in the United States statutes that prohibits persons from setting fire to forests, and this bill has been considered by the Committee on Public Lands, which has reported it unanimously. It has been referred to the Secretary of the Interior, and he has recommended its enactment; and so, it seems to me, there should be no opposition whatever to the measure.

* * * * *

Mr. SHAFROTH. That feature is covered in the second section. I want to explain the necessities for that. Nine-tenths of the forest fires occur on account of campers who go out and camp near some stream and leave a fire burning. They do not totally extinguish it. A wind comes up and blows the fire into the adjoining forest, and then you have a conflagration, and it is almost impossible to extinguish it. The fires have to burn until they come to barren land or a stream of some kind which the fire can not leap; this bill is to meet the case of those people who will start camp fires and will not extinguish them. There is no minimum punishment prescribed, so that the court can take into consideration all the circumstances. It says not more than $1,000; so that the court may inflict a punishment of only $1. We thought it best to leave it entirely in the discretion of the court, which would take into consideration all the circumstances.

* * * * *

Mr. LITTLE. What is to hinder the States or Territories in which these lands lie from

enacting laws for the punishment of this offense?

Mr. SHAFROTH. They have passed laws concerning the subject matter. It is difficult to enforce the State laws. It is fear of Federal jurisdiction that will make the offenders observe the law.

Mr. LITTLE. If the people of the Territories or States who are to be protected by this will not respect the laws of their own States, it will not justify Congress, I think, in placing the matter under the jurisdiction of the Federal courts.

Mr. SHAFROTH. In answer to that suggestion, I wish to say just this: We have had some legislation of this kind on our State statute, of course; but persons living in the immediate vicinity of this timber are not so much interested in its preservation as those who live on the plains below who want the water during the summer months.

APPENDIX B

PARTIAL LIST OF CRIMINAL PROSECUTIONS UNDER SECTIONS 52 AND 53 OF THE PENAL CODE, BASED ON FIRES SET ON PRIVATE LANDS ADJACENT TO THE PUBLIC DOMAIN, AND ARISING IN CONNECTION WITH THE ADMINISTRATION OF THE NATIONAL FORESTS

United States v. *Henry Clay,* tried in 1910. Defendant was convicted under Section 52 in the United States District Court for the Southern District of California for starting on privately owned land adjacent to a National Forest, by the use of burning glasses, a fire which subsequently spread to the National Forest. Judge Wellborn said in instructing the jury:

> You are further charged that it is immaterial whether the fire of October 19, 1909, mentioned in this indictment, originated on private land, if it was set wilfully, and if, in the course of nature and in view of all the surroundings, the said fire would reasonably be expected to be communicated to the public domain. A man has no lawful right to set fire to his own property, if he has reason to believe or intends that such fire will be communicated to the property of others and destroy it.
>
> If, therefore, the defendant placed in position the wire frames, lenses and matches, about which the witnesses have testified, so that the sun's rays would be focused by the lenses upon said matches, thereby igniting the latter, and setting fire to the grass and other inflammable material in that vicinity, and the fire thus set was communicated to the

> public domain, and that the defendant had reason to believe that, in the ordinary course of nature, such fire would be communicated to the public domain, then he is responsible for the extension of the fire into the public domain, and the same was wilful and unlawful.

In *United States* v. *Thomas W. and Amos Smith,* in the United States District Court for South Dakota, Western Division, tried September 5, 1913, the fire was set on land claimed by the defendant under the homestead laws of the United States, the entry for which had not yet been perfected. The defendants were prosecuted under Sections 52 and 53 of the Criminal Code. The court instructed the jury:

> In the light of that statute (Section 52) and of the evident purpose, I have no hesitation whatever in instructing you that it is my judgment that a fair interpretation of the intent of the legislative will is that this statute is prohibitive and that a fire left burning unattended by a citizen near the timber or other inflammable material upon the Reserve is guilty of the offense charged in the first count of the indictment. * * *
>
> If they set a fire upon their premises in the immediate vicinity of this Reserve and left it in such a manner as would have led one to believe that the fire would naturally under the conditions that existed there spread and extend to these trees and the Forest Reserve, then they are guilty under the third count.

In *United States* v. *James Riley,* in the United States District Court for South Dakota, the defendant, on September 2, 1913, plead guilty and was fined on account of a fire which was started

by his sawmill upon patented land and allowed to burn unattended until it escaped to adjacent National Forest land.

In *United States* v. *J. H. Woodford,* in the United States District Court for South Dakota, the defendant, on September 5, 1913, plead guilty to starting a fire on his unpatented homestead entry adjacent to the Harney National Forest and was fined.

In *United States* v. *Frank Corns,* in the United States District Court for South Dakota, the defendant, on September 4, 1913, plead guilty to starting a fire on his unpatented homestead entry adjacent to the Harney National Forest and was fined.

In *United States* v. *William Kyler,* in the United States District Court for Wyoming, the defendant plead guilty on July 6, 1918, to starting a fire on a mining claim adjacent to the Bighorn National Forest and was fined.

In *United States* v. *Lorenzo Dole,* in the United States District Court for Oregon, defendant was convicted on March 18, 1921, under Sections 52 and 53, of setting fires on private lands adjacent to the Siuslaw National Forest, which fires spread to and set on fire the National Forest.

Many other instances doubtless could be named were the data available.

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